(1) Supreme Court, U.S.
FILED

No. 01-222 MAY 2001

In The
Supreme Court of the United States

J. DOE, M.D.,*

Petitioner,

v.

TENET HEALTHSYSTEM MEDICAL, INC., and EAST COOPER COMMUNITY HOSPITAL, INC.,

Respondents.

On Petition for a *Writ* of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A *WRIT* OF *CERTIORARI*

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QUESTIONS PRESENTED

I. WHETHER THE "INTRA-ENTERPRISE" DOCTRINE SHOULD BE APPLIED TO IMMUNIZE A HOSPITAL AND ITS MEDICAL STAFF FROM ANTITRUST LIABILITY WHEN THE HOSPITAL AND ITS MEDICAL STAFF ARE NOT PERFORMING "PEER REVIEW" AND TERMINATE A PHYSICIAN'S ADMITTING PRIVILEGES FOR REASONS NOT INVOLVING QUESTIONS OF PROFESSIONAL COMPETENCE OR QUALITY OF PATIENT CARE.

II. WHETHER A PHYSICIAN WHOSE HOSPITAL PRIVILEGES HAVE BEEN TERMINATED SOLELY FOR FAILURE TO REFER AN ARBITRARY NUMBER OF PATIENTS TO THE HOSPITAL HAS STANDING TO REQUEST INJUNCTIVE RELIEF ON THE GROUND THE HOSPITAL'S PATIENT REFERRAL REQUIREMENT VIOLATES FEDERAL LAW.

III. WHETHER THE LOWER COURTS APPLIED AN IMPROPER STANDARD OF REVIEW UNDER RULE 56(c) BY EXPRESSLY REFUSING TO CONSIDER IMPORTANT FACTS SUPPORTING THE PETITIONER'S ANTITRUST CLAIMS AND DECIDING DISPUTED FACTS IN THE LIGHT MOST FAVORABLE TO THE RESPONDENTS.

PARTIES BELOW

The parties before this Court are the *pro se* Petitioner, J. Doe, M.D., and the Respondents, Tenet HealthSystem Medical, Inc. and its wholly-owned subsidiary, East Cooper Community Hospital, Inc. Best Care Providers referred to in the Petition is a nonwholly-owned entity affiliated with the Respondent, Tenet HealthSystem Medical, Inc.

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OPINION BELOW

The unreported opinion of the Fourth Circuit Court of Appeals denying the Petition for Rehearing is reprinted in the Appendix at 1. The unreported *per curiam* opinion of the Fourth Circuit Court of Appeals affirming the order of the United States District Court for the District of South Carolina is reprinted in the Appendix at 2 - 3. The unreported opinion of the United States District Court for the District of South Carolina granting summary judgment is reprinted in the Appendix at 4 - 26.

STATEMENT OF JURISDICTION

The opinion of the Fourth Circuit Court of Appeals from which the Petitioner seeks review was issued on November 17, 2000, and became final by the denial of Petition for Rehearing on February 27, 2001. This Petition for Writ of Certiorari is timely filed under Supreme Court Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of 15 U.S.C. §§ 1 and 2, 42 U.S.C. § 1395nn, and 42 U.S.C. § 1320a-7b are set forth in the Appendix at 28 - 55.

STATEMENT OF THE CASE

The setting is an established medical practice known for personal care in a desirable coastal location, the only

medical complex on an island affectionately known as "Mayberry by the Sea." When the nation's second largest health care entity with the shadiest secret past entered the local health care market, the community hospital was lost. The health care conglomerate swallowed the local hospital and began to acquire primary care and specialty practices. The hospital-owned practices were in direct competition with private practitioners. What unfolds is what happens when independent private practitioners "cross paths" with Tenet.

The East Cooper area is an island and coastal community separated geographically from the surrounding area. The Practitioner lives and works on a barrier island connected to the mainland by a drawbridge. It has been named one of the 10 best communities in which to raise a family, a significant factor in the choice of location for the Practitioner's office and home. Access to the only hospital in the geographic area, the only hospital where the Practitioner has privileges, is crucial for the Practitioner's patients as well.

The Practitioner was approached with an offer to locate in the island's only medical building with all administrative and supportive services attached including shared billing, reception, and telephone number. After significant investment and renovations, it was the Practitioner's misfortune to unwittingly become Tenet's co-tenant upon its acquisition of the primary care practice. In hindsight, the outcome is all too predictable: bullied, badgered, bloodied, and bludgeoned. But the methods and tactics are chilling and ominous for the future of health care. When Tenet could not use its considerable influence with its landlord, who was also its physician-employee, to remove its co-tenant, it set its sights on the Practitioner's admitting privileges.

Tenet and its predecessor have been in Court before.

Countless other physicians have been badgered, bullied, and crushed by Tenet's corporate machine for lack of resources to oppose such tactics. It is respectfully submitted that these issues are of tremendous urgency and importance for countless physicians who daily encounter monolithic health care entities relentlessly and incessantly eroding the very foundation of the doctor-patient relationship with abandon and with faceless lack of accountability.

In this case, Tenet, without any notice, in contravention of the bylaws, and in the absence of any wrong-doing, changed the Practitioner's staff category subjecting her to an arbitrary patient referral requirement. Appendix at 57, 58. At the same time, Tenet deleted the Practitioner's Yellow Pages advertising without notice yet continued to collect and deposit monthly payments for said advertising. The Practitioner's Yellow Pages advertising had been routinely renewed by the hospital the previous year signed by Robert Stephens, V.P. Finance for East Cooper Hospital. Then, without authority under the bylaws, Tenet subjected the Practitioner to an unscheduled review of admitting privileges, reclassified her to a "devised" staff category of provisional Associate Active, and advised her admitting privileges would be terminated unless she referred an arbitrary number of patients to the hospital in violation of the Stark and Anti-Kickback statutes. When the Practitioner made a written request for an appeal, Tenet refused to allow an appeal. Appendix at 66.

One year later, the Practitioner's admitting privileges were summarily terminated in violation of the Bylaws and before the Practitioner was given any opportunity to be heard. Appendix at 68 - 71. The decision which ultimately led to the filing of this case occurred on August 4, 1997, when the Credentials Committee summarily terminated the

Practitioner's admitting privileges in the absence of any wrong-doing and in violation of the 1995 bylaws then in effect. There was no notice. There was no hearing. This decision was taken after the Practitioner's direct economic competitor, Dr. Grady, falsely represented it would not harm the Practitioner's practice. Appendix at 68 - 69. Dr. Grady was the only other full-time general ophthalmologist in the relevant market. Dr. Grady was not residency-trained in the most modern and most pertinent procedure, phacoemulsification. He did not abstain in the face of a direct conflict of interest. Administrative appeals were exhausted but there was no report of the review committee's findings and recommendations as required under the bylaws. The Practitioner was informed the committee recommended restoration of admitting privileges. The Practitioner was denied the opportunity to appear before the Board either in person or by counsel. The Board ignored the committee's recommendation. Having no alternative, the Practitioner was forced to seek redress through the judicial system.

The Practitioner raised the federal questions sought to be reviewed in this Petition for Certiorari involving 15 U.S.C. §§ 1 and 2 in the Complaint filed in the United States District Court on March 26, 1999. The Practitioner raised the federal question sought to be reviewed involving 42 U.S.C. § 1395nn and 42 U.S.C. §1320a-7b in the Amended Complaint filed in the District Court on December 6, 1999. The issues were preserved and argued before the District Court when it considered the Respondent's motion for summary judgment. The District Court addressed these issues in its order granting summary judgment filed on April 17, 2000. The Practitioner preserved and argued these issues in the appeal to the Fourth Circuit Court of Appeals. The Fourth Circuit Court of Appeals affirmed in a *per curiam* opinion and the Practitioner

again preserved and argued these issues in the Petition for Rehearing. The Fourth Circuit Court of Appeals denied rehearing without further comment.

With all due respect, the Practitioner submits the District Court's Order dated April 17, 2000, improperly omitted consideration of many undisputed facts. It is undisputed that the 1995 bylaws were in effect at all relevant times up to and including the Credentials Committee's unauthorized summary termination of the Practitioner's admitting privileges in August, 1997. Further, it is undisputed that the patient referral provision is in the same category as the meeting attendance requirement and is characterized as a "support of the hospital" provision based upon economic or financial and not professional considerations. Hospital bylaws are an inducement to physicians to apply for privileges. Hospitals enact bylaws and represent that they will be followed and that physicians will be treated fairly in accordance with the procedural safeguards and fair hearing provisions of the bylaws. The Practitioner reasonably relied upon the bylaws and the representation that they would be followed. As stated in the bylaws, hospital committees have authority to make recommendations only. In this case, the Credentials Committee and Medical Executive Committee, with a direct economic competitor participating, usurped the power of the governing Board and summarily terminated the Practitioner's hospital privileges without a hearing. Under applicable State law, as provided in the cases of Pee Dee Nursing Home v. Florence General Hospital, 419 S.E.2d 834 (S.C.App. 1992) and Lee v. Chesterfield General Hospital, Inc., 289 S.C. 6, 344 S.E.2d 379 (S.C.App. 1986), actions taken without actual or apparent authority under the bylaws are deemed actions of individuals, separate and distinct from the hospital, and are considered concerted actions of co-

conspirators. As acknowledged by the *Respondent's* expert, the termination of the Practitioner's hospital privileges did not involve peer review; therefore, HCQIA immunity does not apply. Appendix at 107. This unauthorized, arbitrary, and illegal patient referral requirement had never been enforced before. Assuming, though not admitting, the patient referral requirement applied, the Practitioner met the bylaws definition of patient contact by "consulting in connection with the hospital" when she saw patients referred by Best Care Providers, a medical practice owned by the hospital. Appendix at 121 (Article IV, Section 2.A.). There were more than 24 consultations with the hospital-owned primary care practice, proffered but ignored. Under the 1995 Bylaws, the patient referral requirement did not apply to members of the Associate staff. Appendix at 86 - 87; 121 (Article IV, Section 3.A.). The Credentials Committee Chairman admitted he and others "devised" the staff category of provisional Associate Active which subjected the Practitioner to an otherwise inapplicable patient referral requirement.

At the end of the initial 12-month appointment, the Practitioner completed her provisional requirement and was reappointed to Courtesy staff in 1995. Appendix 56. Under the Bylaws, reappointment unless otherwise notified is for a two-year term. Appendix at 121 (Article III, Section 4.B). At that time there was no requirement that members of the Courtesy staff have privileges at another hospital. After the Practitioner's reappointment and without notice to Courtesy staff members, there was an amendment to the Courtesy staff category. Thereafter, the Practitioner's reappointment was prematurely reviewed depriving her of the right to complete the two year term of her reappointment. She was subjected to the devised provisional Associate Active staff category and the arbitrary and illegal patient referral requirement. When the

Practitioner attempted to appeal these actions on September 17, 1996, Tenet refused to allow any hearing or appeal. Appendix at 66 - 67.

Under the bylaws, other physicians were given two years to comply with the patient referral requirement and an additional year upon request. Although the Practitioner complied with the hospital's bylaws, unlike other physicians she was granted only one year to meet the arbitrary and illegal patient referral requirement. After subjecting the Practitioner to the unauthorized, illegal, and discriminatory patient referral requirement, the Respondents engaged in a campaign of predatory practices designed to thwart compliance.

The Respondents canceled the Practitioner's Yellow Pages advertisement without notice although they continued to collect monthly checks from the Practitioner for such advertising. The Respondents terminated telephone answering, call, and patient reception services. They stopped providing her with administrative services such as file management and insurance billing. The Respondents systematically diverted the Practitioner's established and prospective patients to physicians employed by Tenet. The Respondents promoted use of a preferential emergency room call schedule which excluded multiple physicians including the Practitioner. See Dept. of Surgery Meeting Minutes, Dr. Grady presiding, October 4, 1996. All occurring against a backdrop of insults and slander of the Practitioner's professional reputation. Appendix at 104.

Physicians are encouraged by the hospital to seek advice on the bylaws from the Medical Staff Office (MSO). The Practitioner was advised by the MSO that under the bylaws she would have at least an additional year to meet the patient referral requirement. After the Respondents refused a

written request for appeal, the Practitioner relied upon the MSO's advice. At the end of the year, however, her admitting privileges were terminated without notice and without any opportunity to be heard. Two years after the initial request for appeal in September, 1996, the Practitioner was finally granted a hearing, however, the hospital refused to allow the MSO and other hospital employees to be called as witnesses to testify regarding these and other material issues such as alteration of documents by the MSO after the request for appeal.

During this time the Practitioner attempted to seek hospital privileges at other area hospitals but was ineligible because of the time that had elapsed since she had completed her ophthalmology residency training. Appendix at 60 - 63. The hospital's decision to terminate the Practitioner's privileges constitutes a "black mark" which must be reported to various governmental agencies and insurance companies raising the specter of unprofessional conduct or substandard patient care. Without admitting privileges, the Practitioner is unable to provide full ophthalmologic services to her patients. The Practitioner is trained, duly licensed, and has patients requesting services requiring admission to the only hospital in the geographic area and the only hospital where the Practitioner has privileges. The actions of the hospital have destroyed the Practitioner's ability not only to compete in the health care market but have threatened to destroy her practice and have precluded her from providing the patient care she is qualified and competent to perform.

REASONS FOR GRANTING THE WRIT

The Practitioner is a qualified and competent physician who has been deprived of admitting privileges in the

only hospital located in her geographic area and the only hospital where she has privileges. The hospital's decision to terminate the Practitioner's admitting privileges was based upon considerations totally unrelated to quality of patient care concerns. The District Court found "It is undisputed, and actually admitted within the Hospital's correspondence, that the actions taken in regard to Dr. Holmes' privileges did not in any way implicate her professional competence or patient care. There is no allegation that Dr. Holmes is not a fully qualified and competent physician, nor any allegation of a single incident or problem with her medical care to any patient." Appendix 10 - 11. The decision to terminate the Practitioner's hospital privileges did not involve peer review undertaken pursuant to the Health Care Quality Improvement Act (HCQIA). Nevertheless, the District Court granted summary judgment based upon the assertion that a hospital and its medical staff cannot conspire under the Sherman Act, 15 U.S.C. § 1, because of the "intra-enterprise" doctrine established by this Court in the cases of United States v. Yellow Cab. Co., 332 U.S. 218 (1947) and Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

The intra-enterprise doctrine has heretofore been applied by the Third, Fourth, and Sixth Circuits to preclude judicial review of the peer review process involving patient care issues. This case presents the important Federal question whether the intra-enterprise doctrine should be extended to decisions denying or terminating a physician's hospital privileges that do not involve the peer review process and whether such an extension under the facts of this case conflicts with prior relevant decisions of this Court.

The sole reason given for the termination of admitting privileges was failure to comply with an inapplicable and illegal requirement for referral of an arbitrary number of

patients to the Respondents. The Practitioner alleged in her pleadings that the hospital's referral quota violated the Federal Stark, 42 U.S.C. § 1395nn, and Anti-Kickback, 42 U.S.C. § 1320a-7b, statutes. The clear legislative purpose of the Stark and Anti-Kickback statutes is to prevent antitrust injury to medical consumers. The District Court did not find that the patient referral quota was legal but ruled the Practitioner lacked standing to seek injunctive relief because the statutes do not create a private cause of action. Other Courts have held that medical practitioners have standing to allege Stark and Anti-Kickback violations to obtain injunctive relief.

The Court of Appeals sanctioned the District Court's granting of summary judgment. Under Rule 56, this decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. The District Court expressly ignored important facts, found disputed facts in favor of the moving party, and drew all inferences adversely to the Practitioner. The facts in this case go far beyond a simple staffing decision. The hospital in this case is wholly-owned by a corporation which, through various partially-owned, affiliated entities, directly competes with physicians in the health care market. The District Court expressly ignored these crucial facts stating, "Dr. Holmes has also made factual allegations concerning her relationship with Durst Family Medicine, a medical practice which sold its assets to the [Respondents] in 1994. However, a detailed rendition of these factual allegations is not necessary as they do not relate directly to the federal claims asserted." Appendix at 11. In this case, there are material questions of fact whether the hospital's corporate owner, through its partially-owned subsidiary, Best Care Providers, engaged in predatory practices from which a

jury could find "a conscious commitment to a common scheme designed to achieve an unlawful objective" in violation of the Sherman Act. The predatory practices ignored by the District Court included slander, attempting to have the Practitioner evicted from her office space, the systematic diversion of the Practitioner's patients to Tenet's employee-physicians, canceling the Practitioner's Yellow Pages telephone advertising, and terminating administrative services. It is respectfully submitted these facts do relate directly to the federal antitrust claims asserted. Whether hospitals, their corporate owners, and partially-owned affiliated entities should be afforded anti-trust immunity even when they step outside a hospital's traditional roles and directly compete for medical patients is an important federal question that has not been, but should be, decided by this Court. The Lower Court, by ignoring these crucial facts and by deciding facts in the light most favorable to the Respondents, applied an improper standard and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

ARGUMENT

I. WHETHER THE "INTRA-ENTERPRISE" DOCTRINE SHOULD BE APPLIED TO IMMUNIZE A HOSPITAL AND ITS MEDICAL STAFF FROM ANTITRUST LIABILITY WHEN THE HOSPITAL AND ITS MEDICAL STAFF ARE NOT PERFORMING "PEER REVIEW" AND TERMINATE A PHYSICIAN'S ADMITTING PRIVILEGES FOR REASONS NOT INVOLVING

QUESTIONS OF PROFESSIONAL COMPETENCE OR QUALITY OF PATIENT CARE.

The Eleventh Circuit recognized the importance of hospital privileges to physicians in Bolt v. Halifax Hospital Medical Center, 891 F.2d 819 (11th Cir. 1990) when it noted, "A negative decision at one hospital [can] affect the decision of another hospital; therefore ... a negative decision at one hospital [can] be tantamount to excluding a doctor from the profession as a whole." *Id.* at 820.

"Without hospital admitting privileges, a physician cannot properly treat patients and is therefore effectively excluded from the market."[1] "Staff privileges are the life-blood of any medical practice. Without staff privileges, doctors cannot perform many of the rudimentary tasks that are required of a physician. In the absence of staff privileges, they must rely on other practitioners to admit and care for their patients in the hospital. Therefore, staff privileges are essential to any successful practice."[2] "In the ideal, the [credentialing] committee carefully and impartially weighs each doctor's qualifications and then decides whether to award or rescind privileges. It is difficult to forget, though, that outside the hospital's walls, these physicians are the same doctors who potentially must compete for patients with the new privileged physician."[3] "A physician ... may directly

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[1] Kurt Erskine, Square Pegs and Round Holes: Antitrust Law and Privileging Decisions, 44 U. Kan. L. Rev. 399 (1966).

[2] *Id.* at 401-402 citing John Neff, Physician Staff Privilege Cases: Antitrust Liability and the Heath Care Quality Improvement Act, 29 Wm & Mary L. Rev. 609, 612-613.

[3] *Id.* at 399 citing William S. Brewbaker, III, Antitrust Conspiracy

benefit from limiting others' access to the [hospital], because it means fewer competitors with whom he must compete. Doctors may choose to advance their own economic interests through the hospital's credentialing and peer review process by refusing to award [or by terminating] privileges to competent practitioners."[4]

In Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976), this Court held hospitals were subject to the antitrust laws. This principal was strengthened by this Court's later decisions in Patrick v. Burget, 486 U.S. 94 (1988) and Summit Health Ltd. v. Pinhas, 500 U.S. 94 (1988) specifically holding a hospital's peer review process was subject to the antitrust law. Yet, as this case so plainly illustrates, judicial review of the denial or termination of hospital privileges for alleged violations of the antitrust laws remains illusive.

Judicial review has often been limited by the application of the "intra-enterprise" doctrine enunciated by this Court in the cases of United States v. Yellow Cab. Co., 332 U.S. 218 (1947) and Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984). This doctrine has been applied by the Third, Fourth, and Sixth Circuits to preclude judicial review of credentialing decisions challenged for violating the Sherman Act's prohibition of any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," 15 U.S.C. § 1, on the grounds a hospital and its medical staff constitute a single

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Doctrine and the Hospital Enterprise, 74 B.U.L.Rev. 67, 68 (1994).

[4] *Id.* at 402.

legal entity when making peer review decisions affecting a physician's hospital privileges.[5]

The Fourth Circuit, from which this Petition is taken, is illustrative of the application of the intra-enterprise immunity doctrine to circumvent judicial review in cases involving loss of physician privileges. In Oksanen v. Page Memorial Hospital, 945 F.2d 696 (4th. Cir. 1991), *cert. denied* 112 S. Ct. 973 (1992), the *en banc* Fourth Circuit held that, although technically two distinct legal entities, when a hospital and its medical staff are performing **peer review** they act in substance as one indistinct entity with a unity of interest - increasing the quality of patient care - and, therefore, their actions do not implicate the concerns of section one of the Sherman Act."[6]

The absolute exemption of hospital credentialing decisions from antitrust liability on the ground of intra-enterprise immunity is inconsistent with this Court's holding in Summit Health Ltd. v. Pinhas, *supra*.. It is also inconsistent with the Congressional intent of the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. § 11112, which established the peer review process. Congress was clearly aware of this Court's decisions and chose to grant hospitals and physicians only **limited** immunity from the

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[5] *Compare*: Oksanen v. Page Memorial Hospital, 945 F.2d 696 (4th. Cir. 1991), *cert. denied* 112 S. Ct. 973 (1992); Weiss v., York Hospital, 745 F.2d 786 (3rd. Cir. 1984, *cert. denied* 470 U.S. 1060 (1985); and Nurse Midwifery Assoc. v. Hibbet, 918 F.2d 605 (6th Cir. 1990) *amended* 927 F.2d 904, *cert. denied* 112 S.Ct. 406 (1991) *with* Bolt v. Halifax Hospital Medical Center, *supra*.

[6] *See*: Christopher Lauren, Oksanen v. Page Memorial Hospital: The Fourth Circuit's Antitrust Analysis for Peer Review Action Under the Sherman Act, 6 BYU J. Pub. L. 603, 611 (1992).

antitrust laws when performing peer review. "The Patrick decision was partly responsible for motivating Congress to enact the Health Care Quality Improvement Act ("HCQIA") in 1986. HCQIA was designed to 'immunize the medical profession from antitrust liability for its peer review activities..." "Many members of Congress opposed any grant of immunity, fearing 'that it could be used to shield not just legitimate peer-review actions... but also illegitimate peer reviews motivated by prejudice, anticompetitive purposes, personal vindictiveness, or by some other concern wholly unrelated to the quality of the physician's medical care."[7] "Representative Ron Wyden said that the Act was not intended to 'shield doctors from liability for what are truly anticompetitive business practices. The only protected activities are those dealing with the professional behavior and competence of individual practitioners.' Additionally, Congressman Waxman stated that the 'bad faith peer review activities permitted by the Patrick case could never obtain immunity under H.R. 5540.'"[8] Therefore, "To qualify for immunity [under HCQIA], defendants must first demonstrate that any action initiated by the peer review process was motivated by 'the reasonable belief that the action was in the furtherance of quality health care.'"[9]

In Oksanen, *supra.*, the Fourth Circuit detailed the litany of complaints against Dr. Oksanen including abusive and profane language, public outbursts disrupting hospital operations, public accusations denigrating the quality of the hospital's and other physician's patient care, failure to

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[7] *Id.* at 808.

[8] *Id.* at 809.

[9] Erskine, supra. 44 U. Kan. L. Rev. at 415 *citing* 42 U.S.C.§ 11112(a)(1)(1988).

provide on call coverage, delayed medical treatment jeopardizing the welfare of a mother and her newborn child, practicing medicine without a valid license, and professional negligence resulting in the death of a patient all of which clearly involved concerns about professional competence and quality of patient care. Under the egregious circumstances, the Fourth Circuit reasonably concluded the hospital and its medical staff were performing peer review with a unity of interest to insure quality patient care and, therefore, could not conspire to violate Section 1 of the Sherman Act. The Court was careful to point out that the direct economic competitors of Dr. Oksanen abstained from the decision making process and that the hospital was not a competitor so that the "personal stake exception" to the intra-enterprise doctrine did not apply. Having denied certiorari, it is obvious this Court did not feel the application of the intra-enterprise immunity doctrine in cases involving the peer review process conflicted with the Court's previous decision in Summit Health Ltd. v. Pinhas, *supra*.

This case presents the question whether the intra-enterprise doctrine should be extended to protect hospital credentialing decisions that do not involve the peer review process. The Respondents' expert testified this case was not peer review under HCQIA. Appendix at 107. Peer review involves opening a specific medical chart or charts to review the medical care given to a particular patient. The decision to terminate the Practitioner's admitting privileges in this case did not involve any question of the Practitioner's professional competence or the quality of patient care. The District Court Judge specifically found, "It is undisputed, and actually admitted within the Hospital's correspondence, that the action taken in regard to Dr. Holmes' privileges did not in any way implicate professional competence or patient care."

Appendix at 10-11.

The Practitioner is a good and ethical physician. She graduated from the Medical University of South Carolina at the top of her class. While still a medical student, she completed a family medicine rotation at the Durst Family Medicine practice located on Sullivan's Island where the Practitioner has lived with her family for 20 years. After medical school, the Practitioner completed internship and ophthalmology residency training. She graduated from the Medical University of South Carolina's Storm Eye Institute in June of 1993. She began looking for office space to open a practice and Durst Family Medicine offered to lease her office space and to provide administrative, billing, reception, and telephone services. General ophthalmologists are considered primary eye care physicians and the proposed relationship with a family medicine practice which had been serving the community for almost fifty years seemed like a perfect match.

Like any other physician starting out the Practitioner borrowed heavily to purchase and install expensive medical equipment, renovate her office space, and to provide operating capital in order to open her practice. Advertisements were placed in the local newspapers and telephone book Yellow Pages advertising was obtained showing the address and telephone number shared with Durst Family Medicine. Patients who called were greeted by the Durst Family Medicine staff who scheduled appointments, handled the patient charts, took care of patient billing, and provided the myriad of administrative tasks associated with the running of a medical practice. The Practitioner enjoyed a close professional relationship with the physicians of Durst Family Medicine and regularly consulted in the care of their patients.

To practice ophthalmology it was of course necessary

that the Practitioner obtain hospital privileges. She applied for and was granted associate staff privileges at the Respondent East Cooper Community Hospital on July 25, 1994. The East Cooper community is a rapidly growing but geographically isolated area separated from the greater Charleston metropolitan area by the Charleston Harbor and the Cooper and Wando Rivers. It was precisely because of the area's unique geographic features that the Respondents' predecessor, AMI, applied for and was granted a state-adjudicated certificate of need to build and operate a hospital in the East Cooper community. Appendix 109 - 116.

With the demands of a young family and just starting out as an ophthalmologist, the Practitioner discussed with Elaine Meuli, the Medical Staff Coordinator, transferring to the courtesy staff, a staff category which did not require the Practitioner to refer any number of patients to the hospital in order to maintain privileges. Appendix at 121 (Article IV, Section 4). In November of 1994, the Practitioner transferred to Courtesy staff. She completed her provisional year in July of 1995 and was granted full Courtesy staff privileges. Appendix at 56.

It was during this time that the Respondents purchased East Cooper Community Hospital from AMI. The Respondent Tenet HealthSystem Medical, Inc., also began the acquisition of local primary care and specialty medical practices thereby becoming a direct economic competitor in the market place. Durst Family Medicine was one of the practices purchased by the Respondents and was renamed Best Care Providers. The Respondent's COO clarified in his deposition the Respondents do not own Durst Family Medicine but only that "certain assets" of Durst Family Medicine were purchased by Best Care Providers. Appendix at 91 - 92, 94 - 95.

The record further establishes the Respondents did not purchase the Durst Family Practice building but coveted the Practitioner's office space located in it. The Respondent's COO testified in his deposition he first learned of the Practitioner's lease when "Jack said he was going to terminate" the lease agreement. Appendix at 94. The Respondents tried to lease the Practitioner's office space from the building's owner. Appendix at 96 - 97, 98 - 99. Fortunately, the owner honored his contract and commitment to the Practitioner and declined the Respondents' offer. The Respondents then took a different tack and attempted to pressure the office manager to increase the Practitioner's administrative fees by 500%. Appendix at 65, 98 - 100. Although they continued to receive monthly payments for the Practitioner's telephone Yellow Pages listing which they routinely renewed the year before, the Respondents canceled the listing without notice. Appendix at 108 - 109. The Respondents, acting through their partially-owned affiliate, Best Care Providers, also discontinued the Practitioner's administrative services including reception services, answering service, call service, file storage, and billing services. The Respondents cavalierly dismiss these complaints. But that's not all they did. Without any justification, they intentionally and systematically began to divert the Practitioner's existing and prospective patients to Best Care Provider physicians. Appendix at 101.

With her landlord refusing to evict, with the termination of the Practitioner's administrative services, and with the diversion of existing and prospective patients as a backdrop, the Respondent hospital then subjected the Practitioner to an unscheduled review of privileges on April

12, 1996.[10] Appendix at 57.

The Practitioner's licensing and credentials had always remained in good standing. Not a single patient complaint, never mind malpractice claim, had been made involving the Practitioner's patient care. The termination of the Practitioner's hospital privileges which followed had absolutely nothing to do with peer review or quality of patient care concerns. Yet, when ultimately forced to seek judicial review, the District Court refused to recognize any distinction between peer review decisions made to prevent unprofessional conduct or substandard patient care and other staffing decisions made for purely economic reasons.

The District Court expressly chose to ignore all the facts supporting an anti-competitive motivation for the termination of the Practitioner's admitting privileges. The District Court stated, "Dr. Holmes has also made factual allegations concerning her relationship with Durst Family Medicine, a medical practice which sold its assets to the [Respondents] in 1994. However, a detailed rendition of these factual allegations is not necessary as they do not relate directly to the federal claims asserted." Appendix at 11.

Since neither professional competence nor quality of patient care was involved in the decision to terminate the Practitioner's privileges, the decision was not peer review. The policy considerations underlying the intra-enterprise doctrine are inapplicable to credentialing decisions which do not involve professional competence or patient care issues. It is respectfully submitted the extension of the intra-enterprise doctrine under the facts of this case is in direct conflict with

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[10] Although labeled a second request, the hospital has never been able to produce a copy of the first request.

the purpose of peer review under HCQIA. It constitutes an exception that swallows the rule announced by this Court in the cases of Hospital Building Co. v. Trustees of Rex Hospital, *supra.*, Patrick v. Burget, *supra.*, and Summit Health Ltd. v. Pinhas, *supra.*, that hospitals and staffing decisions, even peer review decisions, are subject to review in Federal Court for violation of the antitrust laws. This important question of federal law affects the rights of good physicians, including the Practitioner, who are being forced out of practice by corporate medicine actively engaged in efforts to monopolize regional medical markets by purchasing essential hospital facilities and surrounding specialty and primary care medical practices. The Practitioner is a good, qualified, and competent physician who has been deprived of admitting privileges in the only hospital located in the geographic area. In fact, the hospital argued for and obtained a state-adjudicated certificate of need essentially granting it monopoly status. The Practitioner has been deprived of admitting privileges in the only hospital where she has privileges. The actions taken will affect her ability to practice her chosen profession not just in the area where she lives but in any location. The Practitioner has complained of specific predatory conduct undertaken by the Respondents and their affiliated entities in direct economic competition with the Practitioner but has had the door to the Federal Courthouse summarily closed based upon an unwarranted and dangerous extension of the intra-enterprise doctrine to credentialing cases not involving peer review. It is respectfully submitted this Court should grant the Practitioner's request to consider this important question which has not been, but should be, decided by this Court in a way that is consonant with and which gives effect to the prior relevant decisions of this Honorable Court.

II. WHETHER A PHYSICIAN WHOSE HOSPITAL PRIVILEGES HAVE BEEN TERMINATED SOLELY FOR FAILURE TO REFER AN ARBITRARY NUMBER OF PATIENTS TO THE HOSPITAL HAS STANDING TO REQUEST INJUNCTIVE RELIEF ON THE GROUND THE HOSPITAL'S PATIENT REFERRAL REQUIREMENT VIOLATES FEDERAL LAW.

As a physician, the Practitioner's paramount responsibilities are to her patients. As set forth above, the Practitioner's professional competence and the quality of her patient care has never been questioned by the hospital, her fellow physicians, her patients, or by the Courts below. The Practitioner's care and treatment of her patients has also been subject to review and regulation by various State and Federal health care agencies and health insurance companies. She cannot admit patients to the hospital or perform medical procedures unless those services are deemed medically necessary and in accordance with established medical criteria. To prevent unnecessary and costly ophthalmic surgery, often desired by patients, ophthalmologists in particular are closely regulated in this regard.

In this case, the sole reason the Practitioner's hospital privileges were terminated is because she did not refer an arbitrary number of patients to the Respondent hospital for treatment. The Practitioner's Amended Complaint challenged Respondents' enforcement of the patient referral requirement on the grounds it was illegal and violates the Federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b, and Stark Law, 42

U.S.C.§ 1395nn.[11] The Anti-Kickback statute provides that whoever knowingly or willfully solicits or receives any "remuneration ... directly or indirectly, overtly or covertly, in cash or in kind in return for referring an individual to an entity for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program shall be guilty of a felony and upon conviction shall be fined not more than $25,000.00 or imprisoned for not more than 5 years or both." The Stark Law provides that if a physician has a "financial relationship" with an entity, then the physician may not make a patient referral to the entity for the furnishing of health services, including inpatient and out-patient hospital services, for which payment may be made under a Federal health care program. A "financial relationship" is defined to include any "compensation arrangement" involving any "remuneration directly or indirectly, overtly or covertly, in cash or in kind" between the physician and an entity. 42 U.S.C. §1395nn(a)(2)(B) and (h)(1)(A)-(B). Congress introduced the term "remuneration" in the 1997 amendments to the act to broaden the reach of the law which previously had prohibited only "kickbacks, bribes, and rebates." Hanlester Network v. Shalala, 51 F.3rd 1390, 1398 (9th Cir. 1995).

The hospital bylaws in this case create an explicit *quid pro quo*: in order to maintain essential hospital privileges a physician must refer an arbitrary number of patients to the hospital for treatment. The Respondent's expert and CEO both conceded hospital staff privileges have a significant value to a physician. Appendix at 107. In Polk County,

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[11] The Petitioner also alleged violations of similar State statues including the South Carolina Provider Self-Referral Act, S.C. Code Ann. § 44-113-10, *et seq.*

Texas v. Peters, 800 F. Supp. 1451 (E.D. Tex. 1992), the Texas District Court held that a recruitment agreement conditioned upon the physician referring patients to the hospital was a violation of the Stark law.

The harm sought to be prevented by these statutes is not just hypothetical in this case. Discovery revealed that physicians complied with the illegal referral quota by seeing patients in the much more expensive hospital emergency room. Appendix at 90, 107. When the Practitioner attempted to discuss the patient referral quota with the Chairman of the Credentials Committee, he as much as admitted the anti-competitive purpose of the requirement by bluntly informing her, "Under managed health care, there's a smaller pie and some doctors are going to be left behind." Appendix at 60. Additional harm resulted in the form of limited choice. The unauthorized patient referral quota was improperly applied to one or more other ophthalmologists. A review of the ophthalmology E.R. call schedules for August, 1997, and for September, 1997, shows that Dr. Grady was the sole remaining general ophthalmologist on active staff after these actions. Appendix at 71-78. The other physicians listed on the call schedule were all subspecialists whose practices were limited to retina, glaucoma, and oculo-plastics. After the Practitioner's privileges were terminated, Dr. Grady advertised he was the only full time general ophthalmologist practicing in the East Cooper market. Appendix at 78-79.

Two years after the Practitioner's initial appeal on September 17, 1996, the Practitioner was finally granted a flawed hearing. She was denied the right to call hospital employees as witnesses. She was denied a report of the Committee's findings and recommendations to the Board. She was denied the right to appear in person or by counsel before the Board. It is hardly surprising the Practitioner was

forced to carry the fight for her professional life to the District Court after the Board "rubber-stamped" the termination of privileges.

What is surprising is that the District Judge denied the Practitioner the right to challenge the patient referral requirement as being illegal and unenforceable under the Anti-Kickback and Stark statutes. Relying upon West Allis Memorial Hospital v. Bowen, 852 F.2d 251 (7th Cir. 1988) and Home Health Services, Inc. v. Currie, 706 F.2d 251 (4th Cir. 1983), the District Court ruled the statutes do not create a private cause of action and, therefore, the Practitioner lacked standing to seek injunctive relief. It is respectfully submitted the Judge's reliance on the Seventh Circuit decision was misplaced. Although the Seventh Circuit in West Allis Memorial Hospital v. Bowen, *supra.*, held the statutes did not create a private cause of action, they reversed the granting of summary judgment by the District Court and remanded the action for consideration whether the plaintiff was entitled to injunctive relief under anti-trust causes of action. Other cases cited by the District Court also allowed plaintiffs to assert violations of the statutes to void contractual arrangements. *See*: Nursing Home Consultants, Inc. v. Quantum Health Services, Inc., 926 F. Supp. 835 (E.D. Ark. 1996); Modern Medical Laboratories, Inc. v. Smith-Kline Beecham Clinical Laboratories, Inc., 1994 WL 449281 (N.D. Ill. 1994); Polk County v. Peters, 800 F. Supp. 1451 (E.D.Tex. 1992); Vana v. Vista Hospital Systems, Inc., 1993 WL 597402 (Cal. Super. 1993); Feldstein v. Nash Community Health Services, Inc., 51 F. Supp.2d 673 (E.D.N.C. 1999).

The sole reason the Practitioner's hospital privileges were terminated is because she failed to refer an arbitrary number of patients to the hospital. The Practitioner claims the

patient referral requirement violates Federal Anti-Kickback and Stark laws. It is hornbook contract law that illegal contracts are unenforceable. The District Court did not find the patient referral requirement was legal but denied the right to even raise the issue. This important question of federal law has not been, but should be, decided by this Court to give effect to the intent and purpose of the Federal laws and to resolve the conflict among the Circuits.

III. WHETHER THE LOWER COURTS APPLIED AN IMPROPER STANDARD OF REVIEW UNDER RULE 56(c) BY EXPRESSLY REFUSING TO CONSIDER IMPORTANT FACTS SUPPORTING THE PRACTITIONER'S ANTITRUST CLAIMS AND DECIDING DISPUTED FACTS IN THE LIGHT MOST FAVORABLE TO THE RESPONDENTS.

The Practitioner brought her case alleging predatory anti-competitive practices that go far beyond a "staffing problem" at a local hospital. The hospital in this case had stepped outside of its traditional role and had become a direct competitor in the health care market. It had purchased a local primary care medical practice that was in direct competition with the Practitioner. As set forth above, this partially-owned affiliate of the Respondents, Best Care Providers, engaged in willful predatory conduct which has resulted in the Practitioner's loss of her only hospital admitting privileges at the only hospital in the geographic area and made it virtually impossible for the Practitioner to provide her patients with the medical care and treatment she is qualified and competent to perform.

Summary judgment is proper only when there is no genuine issue of material fact. Rule 56(c). In other words, to grant summary judgment, the court must determine that no reasonable jury could find for the nonmoving party on the evidence before it. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In evaluating a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Pignons A.S. DeMecanique v. Polaroid Corp., 657 F.2d 482 (1st Cir. 1981); Perini Corp. v. Perini Const. Co, Inc., 915 F.2d 121 (4th Cir. 1990).

The District Court expressly ignored the facts offered by the Practitioner to establish antitrust predatory conduct. The District Court's Order granting the Respondent's summary judgment stated, "Dr. Holmes has also made factual allegations concerning her relationship with Durst Family Medicine, a medical practice which sold its assets to the [Respondents] in 1994. However, a detailed rendition of these factual allegations is not necessary as they do not relate directly to the federal claims asserted." Appendix at 11.

The District Court applied an improper standard when it ignored the facts offered by the Practitioner establishing the Respondents' concerted activity. As set forth above, these additional facts clearly distinguish this case from BCB Anesthesia Care v. Passavant Memorial Area Hospital, 36 F.3d 664 (7th Cir. 1994) relied upon by the District Court in granting summary judgment. In discussing the reasons for refusal to apply antitrust law in the context of a physician's hospital privileges, the Seventh Circuit concluded, "often it appears that in the record relied upon is the absence of facts indicating special circumstances raising antitrust concerns." The Seventh Circuit concluded by saying, "Although we hesitate to say that [a staffing decision at one hospital] ... can

never state an antitrust claim, we believe it is incumbent upon the plaintiff to plead some additional facts from which it can be inferred that the case falls within the ambit of the Sherman Act." Seglin v. Easau, 769 F.2d 1274 (7th Cir. 1985).

The decision by the Lower Court in this case does exactly what the Seventh Circuit said it was not prepared to do - rule a staffing decision at a hospital can never state an antitrust claim. Such a ruling directly conflicts with prior relevant decisions of this Court. Because the Lower Court refused to even consider any of the facts or circumstances offered by the Practitioner, this Court is unable to determine whether facts and circumstances raising antitrust concerns either did or did not exist. The District Court failed to even consider whether the patient referral requirement constituted an illegal tying agreement or *per se* violation of the Sherman Act under Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) when, as in this case, the hospital which possesses an "essential facility" has stepped outside of its traditional role to become a competitor for primary care patients in the health care market.

The Court of Appeals' sanctioning of the District Court's decision in a *per curiam* decision without comment has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. The District Court applied an improper standard when it ignored important facts and found disputed facts in favor of the moving party. The decision of the Lower Court is tantamount to affording hospitals, their corporate owners, and partially-owned affiliated entities absolute antitrust immunity, even when they step outside their traditional roles and directly compete for patients. This important federal question has been previously decided in the cases of Hospital Building Co. v. Trustees of Rex Hospital,

425 U.S. 738 (1976); Patrick v. Burget, 486 U.S. 94 (1988) and Summit Health Ltd. v. Pinhas, 500 U.S. 94 (1988). This Court has consistently held that credentialing decisions of hospitals, even when made as part of the peer review process, are subject to the Federal antitrust laws. The Practitioner respectfully requests that this Court exercise its supervisory power and remand this case for specific findings of fact and rulings of law so that it is possible to determine whether the facts of this case entitle the Practitioner to seek redress in the Federal Courts.

CONCLUSION

For the foregoing reasons, the Practitioner requests that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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